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No. 06-593

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD.
and MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF NEW YORK STATE ASSOCIATION OF HEALTH CARE PROVIDERS, INC. IN SUPPORT OF PETITIONERS

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PRELIMINARY STATEMENT

The New York State Association of Health Care Providers, Inc. submits this brief *amicus curiae* in support of the petition for a writ of certiorari in this case. Both parties have consented to the filing of this brief, and their consent letters are being filed herewith.[1]

INTEREST OF THE *AMICUS CURIAE*

The New York State Association of Health Care Providers, Inc. ("HCP") is a not-for-profit industry association of home and community-based health care providers throughout the State of New York. HCP represents approximately 500 offices of licensed home care service agencies, certified home health agencies, long term home health care programs, hospices and related health care organizations. HCP seeks to foster the interests of the health care industry and the public it serves by developing and supporting programs and policies that promote the highest quality of health care for the residents of New York State.

HCP member agencies employ individuals to provide companionship services in virtually every part of the State of New York. As a result, HCP and its members have a critical interest in the validity of 29 C.F.R. § 552.109(a), a regulation promulgated by the U.S. Department of Labor (the "Department" or "DOL") in 1975 to exempt companionship workers who are employed by third parties from the minimum wage and overtime requirements of the Fair Labor Standards Act ("FLSA"). For

1. Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* HCP, its members and its counsel, made a monetary contribution to the preparation and submission of this brief.

more than 30 years, that regulation has relieved home care provider agencies — and, therefore, the elderly and infirm individuals they serve, who are overwhelmingly medically indigent — of the burdensome cost of complying with the FLSA's minimum wage and overtime requirements. The Department's regulation is predicated upon the Congressional interest in ensuring that companionship services can be afforded by those who require them.

In this case, however, the U. S. Court of Appeals for the Second Circuit has twice declined to enforce the third party employer exemption. *See Coke v. Long Island Care at Home, Ltd.* (No. 03-7666), 376 F.3d 118 (2d Cir. 2004) ("*Coke I*") and *Coke v. Long Island Care at Home, Ltd.* (No. 03-7666), 462 F.3d 48 (2d Cir. 2006) ("*Coke II*").

HCP offers this brief *amicus curiae* in support of the request of petitioners Long Island Care at Home, Ltd. and Maryann Osborne ("Petitioners") for a writ of certiorari. As the representative of home care agencies throughout New York State, HCP has unique, industry-wide access to information that demonstrates that the decisions of the Second Circuit to invalidate the third-party employer exemption contained in 29 C.F.R. § 552.109(a) will have major adverse effects on the ability of home care agencies to provide services, on the earnings of their employees, and on access to quality care for the many thousands of patients who require their services.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S INVALIDATION OF THE THIRD PARTY EMPLOYER EXEMPTION WILL HAVE MAJOR DETRIMENTAL IMPACTS ON ACCESS TO HOME CARE SERVICES BY ELDERLY AND INFIRM INDIVIDUALS WHO DEPEND ON THOSE SERVICES AS AN ALTERNATIVE TO INSTITUTIONAL CARE

The Second Circuit's decision to eliminate the third party employer exemption will cause reductions in both the availability and the quality of home care services. Invalidation of the Department's third party employer regulation will create insurmountable problems for agencies, for workers and for those in need of home care services.

A. Elimination of the Third Party Employer Exemption Will Harm the Home Care Industry's Ability to Provide Services

Invalidation of the third party employer exemption will result in a dramatic disruption in the home care industry and its provision of services. In specific, the sudden and significant increase in wage rates for overtime hours occasioned by the Second Circuit's invalidation of the exemption will leave agencies no option but to reduce overtime hours, because of the severe financial constraints unique to the home care industry.

In its decisions, the Court of Appeals failed or declined to consider the enormous practical problem the home care industry has faced in its efforts to increase employee wages: the great majority of home care services are funded by Medicare, Medicaid and third-party insurance, which means

that public and private payors, and not providers of home care services, establish rates for home care services. *See* Affidavit of Phyllis Wang, sworn to January 15, 2005, annexed to the Motion to the U. S. Court of Appeals for the Second Circuit for a Stay of the Mandate, submitted by Long Island Care at Home, Ltd. and Maryann Osborne, dated January 17, 2005, at ¶16 ("Wang Aff."). Unlike other employers, home care providers cannot simply raise prices to cover an increase in labor costs — including the enormous increase in the cost of services that must occur in the absence of action by this Court to forestall the impact of the Second Circuit's decision. *Id.*

Under the Medicaid program as it is administered in New York, aide services are reimbursed either at a fixed rate or at a rate based on agency costs reported two years prior to the date of reimbursement. *Id.* at ¶17; *see also* N.Y. Pub. Health Law § 3614 (McKinney 2006). Although Medicaid reimbursement rates might, in theory, be adjusted to accommodate the higher overtime costs that would result from the Second Circuit's decisions, the reimbursement rates would not reflect the increased overtime costs until two years after the cost increase occurred. Wang Aff. at ¶17. And in fact, the State and counties may, and frequently do, choose not to increase reimbursements, in whole, or even at all, to enable providers to meet increased costs. *Id.* at ¶17, n.2. The recent history of funding for Medicaid and Medicare home care services gives no cause for hope that federal, State or local legislatures would increase funding to accommodate higher overtime costs.[2] *Id.*

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2. With Medicaid spending approaching $50 billion in fiscal year 2006-07 — nearly half of New York State's total budget for the year — recent legislative and executive initiatives have focused on reducing Medicaid expenditures, not increasing them.

The reality is that agencies cannot possibly sustain current levels of overtime services, at such dramatically increased cost, for as long as two years before rate changes (if any) would take effect. *Id.* at ¶18. Home care agency budgets have been severely pared back in the last decade, largely as a result of Medicaid and Medicare reimbursement reductions by the State and federal governments. *Id.* The average Medicare-certified home health agency had a profit margin of only 1.53 percent in 2004. National Association for Home Care & Hospice (NAHC) Medicare Cost Report Study (January 2005), NAHC, 228 7th Street, S.E., Washington, D.C. Faced with the prospect of waiting two years for an increase in reimbursement rates, agencies would have no choice but to drastically reduce overtime hours. Wang Aff. at ¶18. The change in the overtime calculation would likely result in uncovered shifts and, thus, an inability to service all individuals who need home care. *Id.* at ¶27. Hiring additional home care workers to cover those hours is not a practical option: even those agencies that do not suffer operating deficits at current reimbursement levels report a shortage of workers. *Id.* at ¶22; *see also* Department of Labor, *Occupational Outlook Handbook*, Bulletin 2600 (2006-07), available at *http://www.bls.gov/oco/* ("*Occupational Outlook Handbook*").

The elimination of the third party employer exemption would result in near-term chaos in the home care industry and long-term loss of home care services that are essential to the health and well-being of many New Yorkers — including, in particular, the medically indigent New Yorkers to whom home care services are inaccessible but for the Medicaid program. Wang Aff. at ¶19.

B. Invalidation of the Regulation Will Hurt Home Care Workers

The unique fiscal constraints to which the home care industry is subject likely will mean that elimination of the third party employer exemption will harm, rather than help, home care workers. *Id.* at ¶20. Home care agencies throughout New York express concern that elimination of the exemption will have a harsh impact on employees by forcing reductions in base wages. *Id.* at ¶22. As noted above, agencies report that they will be prevented from authorizing overtime hours if they are required to change the overtime wage calculation to one and one-half times the employee's regular rate of pay without an offsetting increase in reimbursement. *Id.* at ¶20. Agencies are concerned that a reduction in available work hours will result in increased staff turnover, because employees count on overtime hours to make ends meet. *Id.* at ¶21.

Thus, the policy change effected by the Second Circuit's decisions will worsen, rather than relieve, the conundrum facing the home care industry in its efforts to improve conditions for its workers. *See id.* at ¶23. While elimination of the third-party employer exemption will increase overtime rates for home care workers, agencies throughout New York caution that it will not increase — and in many cases will reduce — actual earnings for workers. *Id.*

C. Invalidation of the Third Party Employer Exemption Will Result in Disruption in Continuity of Care to Patients

Critically, the Second Circuit's decisions fail to account for the potential negative impact on home care clients of the policy change they implement. The elimination of overtime hours will have a powerful impact on the agencies' ability to provide continuity of care to patients — that is, the provision of services consistently by the same caregivers to the same patients. *Id.* at ¶24. Continuity of care is so widely recognized to affect the quality of patient care that New York State regulation requires home care agencies to ensure continuity of care to the extent possible. 10 NYCRR § 766.2(a)(3).

If agencies must reduce overtime hours to avoid incurring unreimbursed costs, they will be forced either to eliminate hours of service or to assign more caregivers — each working fewer hours — to service a single patient. *Id.* at ¶25. Many agencies report that they will no longer be able to limit the number of aides assigned to a case or accommodate client requests for the same aides — that is, aides whom the clients have come to know and who are, by experience, knowledgeable about the clients' care needs. *Id.* An increase in the number of caregivers will have a significant deleterious effect on home care clients, who benefit from both the personal comfort and increased quality of service afforded by having only one or two regular care providers.

II. THE SECOND CIRCUIT'S DECISIONS REVERSE DOL'S POLICY DETERMINATIONS AND INTERFERE WITH CONSISTENT NATIONAL ADMINISTRATION OF THE FLSA

The Second Circuit's invalidation of the third party employer exemption will effect a dramatic policy change within that Circuit that is contrary to the Congressional purpose underpinning the exemption and to the informed and reasoned judgment of the Department of Labor, the agency entrusted by Congress to administer and enforce the FLSA. In rendering its decision in *Coke II*, the Second Circuit explicitly acknowledged that the FLSA has multiple, sometimes competing, policy purposes. *Coke II*, Pet. App. at 4a-5a. The court understood that while Congress desired to achieve adequate wages for domestic workers who are regular breadwinners, it also sought to ensure that companionship services remain "affordable for working families." *Coke II*, Pet. App. at 5a. Instead of leaving the balancing of these interests to DOL, however, the Second Circuit effectively negated the policy choices adopted by the agency. As set forth above, the court's invalidation of §552.109(a) will likely harm, rather than help, both companionship workers and the families in need of their services, whom Congress sought to protect.

The Court of Appeals declined to defer to the Department's position in any regard, although it recognized that the Department has given consideration to its current position with respect to § 552.109(a), and that the agency has previously considered and decided against amending the regulation on several occasions. *Coke II*, Pet. App. at 6a. The Second Circuit refused to give deference to § 552.109(a) under *Chevron U.S.A., Inc. v. National*

Resources Defense Council, Inc., 467 U.S. 837 (1984) ("*Chevron*"), although the regulation was promulgated by DOL pursuant to an express Congressional grant to the agency of legislative authority and after notice and comment rulemaking.[3] The court declined to accept the Department's statement that the regulation was promulgated by the agency as an exercise of its lawmaking power. *See Coke II*, Pet. App. 4a; *cf.* Wage and Hour Advisory Memorandum No. 2005-1, Pet App. 63a-64a. Furthermore, the Second Circuit would not defer to the agency's interpretation of its own regulation under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The court rejected outright the explanation and interpretation of § 552.109(a) offered by the agency in its December 2005 Memorandum. *See Coke II*, Pet. App. at 6a.

By refusing to grant *any* deference to DOL, the Second Circuit effectively reversed the policy determinations that had been rendered by the agency over more than thirty years. The court disregarded "the legitimate policy choices" made by the Department. *See Chevron*, 467 U.S. at 866 (1984).

In *Chevron*, this Court explained that it has consistently deferred to administrative interpretations "whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." *Chevron*, 467 U.S. at 844. As further explained in *Chevron*, "an agency to which

3. Without reiterating them fully herein, amicus curiae HCP supports and adopts Petitioners' arguments, including those regarding the Second Circuit's erroneous application of the standards set forth in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments." It is entirely appropriate for the Executive "branch of the Government to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Chevron*, 467 U.S. at 865.

The instruction in *Chevron* is particularly apropos of the concerns presented by 29 CFR § 552.109(a). The Department's repeated consideration of 29 CFR § 552.109(a) over three decades, under the umbrella of its broad statutory mandate to determine wage and hour issues and with the benefit of its unparalleled expertise on those issues, represents the agency's continued effort to review and reconcile the conflicting policies that Congress committed to the agency's care. The Department has considered "the wisdom of its policy on a continuing basis," *Chevron*, 467 U.S. at 864, as evidenced by its willingness periodically to present proposed rule changes for consideration. *See* 58 Fed. Reg. 69,310, 69,312 (1993); 60 Fed. Reg. 46,798 (1995); 66 Fed. Reg. 5481, 5485, 5488 (2001); 67 Fed. Reg. 16,668 (2002). The Department has examined the potential effect of the regulation on the availability and the affordability of home care services. *See id.* In deciding to maintain the third party employer exemption, the Department has had the benefit of the comments offered by interested parties, as well as its own unique expertise. The Second Circuit's erroneous refusal to defer to the Department resulted in a reversal of the policy judgment rendered by the agency entrusted with resolving this policy debate.

Finally, because the decisions of the Court of Appeals invalidated the Department's regulation and effected a policy change only within the Second Circuit, they have given rise to inconsistent application of the exemption nationally. In point of fact, DOL has expressly instructed Regional Administrators and District Directors to continue to apply § 552.109(a) in states outside the Second Circuit. U.S. Department of Labor's Wage and Hour Advisory Memorandum 2005-1 (December 1, 2005), Pet. App. 50a. Moreover, as set forth more fully by Petitioners, the Tenth Circuit has twice upheld the validity of § 552.109(a), so the Second Circuit's decisions are in direct conflict with decisions of the Tenth Circuit. *See Johnston v. Volunteers of Am., Inc.*, 213 F.3d 559 (10th Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001); *Welding v. Bios Corp.*, 353 F.3d 1214 (10th Cir. 2004).

The Second Circuit's decisions have interfered with the Department's consistent administration of the companionship exemption nationally. *Amicus curiae* HCP respectfully urges this Court to grant a writ of certiorari to resolve the conflict created by the decisions in *Coke I* and *Coke II*, on a matter of critical importance to patients, payors and home care service providers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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